

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE CURTIS RIDER,  
Debtor.

BAP No. UT-98-001

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ALISON PARK,  
Plaintiff - Appellee,

Bankr. No. 97-23802  
Adv. No. 97-2235  
Chapter 7

v.

CURTIS RIDER,  
Defendant - Appellant.

ORDER AND JUDGMENT\*

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Appeal from the United States Bankruptcy Court  
for the District of Utah

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Before PUSATERI, PEARSON, and CORNISH, Bankruptcy Judges.

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PUSATERI, Bankruptcy Judge.

Debtor Curtis Rider (“the Debtor”) appeals a bankruptcy court order determining by summary judgment that his obligation to pay certain attorney fees, costs, and other expenses incurred by his ex-wife in post-divorce litigation is nondischargeable under 11 U.S.C. § 523(a)(5). For the reasons stated below, we affirm.

**I. Background**

Because we are reviewing an order granting a summary judgment against

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\* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

the Debtor, we must view the facts in the light most favorable to him.

Accordingly, the facts stated here should not be interpreted as necessarily representing the true historical facts, but merely those that are supported by the Debtor's proffered evidence and the uncontroverted evidence in the record.

While they were married, the Debtor and Alison Park had two sons. When the couple divorced in 1992, they were given joint legal custody and the boys were apparently expected to spend two-thirds of their time with Ms. Park and one-third with the Debtor. The Debtor was ordered to pay child support in accordance with this anticipated time division. Throughout nearly all of 1994, the children actually spent about the same amount of time with each of their parents. Early in December 1994, the Debtor moved to have the divorce decree modified to reflect the parties' actual custody arrangement and to reduce his child support obligation by at least twenty-five percent. In the alternative, if Ms. Park objected to this proposal, the Debtor asked that he be designated the boys' primary caretaker and his home their primary residence, with reasonable visitation awarded to Ms. Park. In response, Ms. Park alleged that the Debtor verbally and psychologically abused the children and might need counseling to help him resolve his continuing difficulties with the divorce and feelings toward the children, Ms. Park, and her present husband. She also asked for an order restraining the Debtor from referring to her present husband in derogatory terms in the presence of the children. Her response did not mention any possible criminal abuse of the children.

Within a few weeks, however, Ms. Park alleged that the Debtor had perpetrated acts of criminal child abuse against the boys. The Debtor's visitation was thereafter severely restricted and numerous investigations were undertaken to determine whether he had abused the children and to determine appropriate custody placement and visitation. At some unspecified time, a guardian ad litem

was appointed for the boys, and he pressed the state court to find that the Debtor had abused the boys, and pressed for criminal prosecution of the allegations. In January 1996, the court did refer the matter for prosecution and the guardian ad litem agreed with and advocated the referral. The record on appeal contains no description of Ms. Park's specific allegations. The only specific criminal abuse allegations that do appear in the record are those discussed in an opinion the state court issued in October 1996.

The parties' dispute was tried for four days in the summer of 1996. In its resulting October 1996 decision, the state court made extensive findings of fact concerning the Debtor's behavior toward his children and Ms. Park. The court found that the Debtor had behaved inappropriately in various ways on a number of occasions. The court specifically found that the Debtor had engaged in activities that might constitute criminal child abuse except that the Debtor did not do them with the necessary intent. The court then awarded full custody of the children to Ms. Park, subject to very limited visitation by the Debtor. The Debtor was allowed visitation for six hours on every other weekend but only under the supervision of a therapist or "lay supervisor." He could have an additional three hours of visitation if he attended church with the boys and the lay supervisor. On the non-visitation weekends, he was allowed to speak to the boys by telephone on Sunday evenings but only with a therapist supervising. The Debtor was permitted to be present at athletic, school, or other public activities the children were involved in, but could not have private time with them on those occasions. He was ordered to obtain therapy from a qualified and licensed therapist who was to report to the court at least every six months, and both the Debtor and Ms. Park were ordered to attend parenting classes.

In an affidavit, the Debtor offers this interpretation of the state court's ruling:

In the course of numerous days of trial . . . , [Ms. Park] and her counsel actively attempted to establish that I had abused the children, through her testimony, the testimony of expert witnesses and others. I actively attempted to prove that the accusations of abuse were false. At the conclusion of the trial, though the court found that I had not been a model parent, the court specifically found that I had not engaged in any conduct, which constituted the abuse of my children as had previously been alleged. In other words, it is my view that I was vindicated on these accusations after the 1996 trial.

Some months later, the state court ordered the Debtor to pay \$30,000 in attorney fees and \$691.48 in costs that Ms. Park had incurred in the post-divorce proceeding, plus \$1,000 she had paid to a doctor. Although the record on appeal does not make this clear, it appears the doctor had provided services for at least one of the children. The state court found that Ms. Park needed financial support to pay these amounts and that the Debtor could afford to pay them. Ms. Park's attorney had billed \$42,734.95, but the court found this amount to be unreasonable and awarded only the \$30,000 noted above. After the Debtor filed for bankruptcy, Ms. Park filed a complaint seeking to have this judgment debt determined to be nondischargeable child support pursuant to 11 U.S.C. § 523(a). As indicated earlier, the bankruptcy court granted her motion for summary judgment.

## **II. Discussion**

Section 523(a)(5) of the Bankruptcy Code excepts from discharge any debt “to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child.” In *Jones v. Jones (In re Jones)*, 9 F.3d 878 (10th Cir. 1993), the Tenth Circuit considered whether a debtor's court-ordered obligation to pay attorney fees incurred by his or her ex-spouse in connection with a custody dispute was covered by this provision. The Circuit held the obligation to be nondischargeable because “the term ‘support’ encompasses the issue of custody absent unusual circumstances not present here,” *id.* at 882, but did not explain what circumstances would qualify for the exception

mentioned. The Debtor contends this case involves such circumstances.

In support his claim of “unusual circumstances,” the Debtor argues that Ms. Park falsely accused him of criminal child abuse, thus forcing him to finance a protracted struggle to disprove her totally unsubstantiated accusations. Under these circumstances, he says, Ms. Park’s attorney fees were not incurred to determine the best interests of the children, and should not be considered as having been incurred for their support. Without deciding the question, for purposes of this decision, we can assume that the “unusual circumstances” mentioned in *Jones* could include a situation where one parent incurred attorney fees in pursuit of frivolous claims of child abuse against the other parent that had no basis in fact. In passing, we wonder whether a state court would order the accused parent to pay such fees, but we will also assume for present purposes that this could happen. The facts in this case, however, do not constitute such circumstances, even when the record is read as much in the Debtor’s favor as is possible.

The state court found that the Debtor had engaged in the activities that had been alleged to be criminal, but then found that the Debtor did not have a criminal motive for doing so. Instead, the court found this conduct showed that the Debtor suffered from poor judgment about the appropriate way to raise his sons. The court also found that the Debtor placed inappropriate emphasis on improper matters with his sons. Thus, the court clearly indicated it believed that the Debtor had engaged in activities with his children that could be viewed as criminal child abuse except for his lack of a criminal motive. So far as we can tell from the record before us, Ms. Park had not alleged any possibly criminal activities besides those mentioned in the court’s opinion. Under these circumstances, we conclude that no rational factfinder could find that Ms. Park’s allegations of criminal child abuse were frivolous and had no basis in fact. We doubt that a party’s litigation

position could ever be found to be frivolous when it fails at trial only because the factfinder, although convinced that the party's opponent engaged in the activities alleged, concludes that the opponent did not have the state of mind required for the party's position to succeed.

Furthermore, both before the bankruptcy court and on appeal, the Debtor has not questioned the state court's findings of fact; indeed, the doctrine of issue preclusion, also known as collateral estoppel, would bar him from doing so. The state court's findings make clear that Ms. Park was justified in pursuing the question of the Debtor's possible criminal abuse of the children and in opposing the Debtor's attempt to increase his custody and visitation rights. While the Debtor seems to assume in his affidavit that Ms. Park is somehow responsible for the guardian ad litem's actions in pressing for criminal prosecution of the Debtor, he has not alleged that the guardian abandoned his duty to review the children's situation independently and impartially and to make objective recommendations, or that Ms. Park exercised some improper or undue influence over the guardian. Even more significantly, despite concluding no criminal abuse occurred, the court found that the Debtor had acted improperly or inappropriately in many ways and that "his parenting skills . . . are abysmal." Indeed, the court restricted the Debtor's visitation rights severely, limiting them not only to less than he had sought but to much less than they had been before he commenced the proceeding.

### **III. Conclusion**

The bankruptcy court's order determining that the Debtor's obligation to Ms. Park is nondischargeable is hereby AFFIRMED.